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should be allowed to relate back to the "original pleading" to avoid the bar of the statute. "[I]t is a natural and salutary development to toll the statute of limitations on all causes of action arising out of the transaction initially pleaded, regardless of legal theory."⁴⁴

C. H. POPE

Civil Procedure—Remittitur—Remitting Parties' Right to Cross-Appeal

With its recent decision in *Mulkerin v. Somerset Tire Service, Inc.*¹ New Jersey allied itself with Wisconsin² in permitting a plaintiff who had accepted remittitur in the trial court to obtain appellate review of the lower court's determination of the damage issue by means of a cross-appeal. In so doing, New Jersey broke with widely accepted precedent at common law which denies all opportunities to the remitting party to complain on appeal.³ Although four states currently provide the remitting party with some method for review by statute or rule of civil procedure,⁴ only Wis-

⁴⁴McLaughlin, *Practice Commentary*, N.Y. CIV. PRAC. LAW § 203(e) (McKinney 1963).

¹110 N.J. Super. 173, 264 A.2d 748 (App. Div. 1970).

²See, e.g., *Plesko v. City of Milwaukee*, 19 Wis. 2d 210, 120 N.W.2d 130 (1963).

³*Conlin v. Southern Pac. R.R.* 182 P. 71 (Cal. Dist. Ct. App. 1919); *Sergeant v. Watson Bros. Transp. Co.*, 244 Iowa 185, 52 N.W.2d 86 (1952); *Iron R.R. v. Mowrey*, 36 Ohio St. 418 (1881).

⁴NEB. REV. STAT. § 25-1929 (1943):

Whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal said action, then the party remitting shall not be barred from maintaining that the remittitur should not have required either in whole or in part.

N.Y. CIV. PRAC. LAW § 5501 (McKinney 1963):

(a) An appeal from a final judgment brings up for review:

....

5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

TENN. CODE ANN. § 27-118 (1955):

In all jury trials had in civil actions, after the verdict has been rendered, and on motion for a new trial, when the trial judge is of the opinion that the verdict in favor of a party should be reduced, and a remittitur is suggested by him on that account, with the proviso that in case the party in whose favor the verdict has been rendered refuses to make the remittitur a new trial will be awarded, the party in whose favor such verdict has been rendered may make such remittitur under protest, and appeal from the action of the trial judge to the Court of Appeals; and if, in the opinion of said Court of

consin and New Jersey offer this opportunity by judicial action. This note will explore the implications of the Wisconsin rule⁶ as adopted by New Jersey and compare its effects with both the general rule⁹ and those statutory or procedural schemes which allow the successful party to challenge the trial court's decision regarding the excessiveness of the original verdict.

Mulkerin involved a suit for personal injuries sustained by the plaintiff, an elderly patron of the defendant's service station, who fell in the station's icy driveway. On her claim for negligence the jury awarded her damages of forty-eight thousand dollars, and her husband, fifty-five hundred dollars on his *per quod* claim. Believing this award to be excessive, the trial court granted a conditional new trial on damages, subject to being defeated if the plaintiff would accept a ten thousand dollar remittitur.⁷ Mrs. Mulkerin consented and judgment was entered from which the defendant took an appeal. Following the defendant's lead, Mrs. Mulkerin then cross-appealed from the court's action in remitting ten thousand dollars of her verdict.⁸

In deciding that Mrs. Mulkerin should be given the right to cross-appeal, the court relied heavily on the practical benefits offered by remittitur. Pointing out that a plaintiff's acceptance of remittitur is influenced by his desire to avoid the delay, expense and risk incident to a new trial or an appeal, the court reasoned that these objectives are frus-

Appeals, the verdict of the jury should not have been reduced, but that the judgment of the trial court is correct in other respects, the case shall be reversed to that extent, and judgment shall be rendered in the Court of Appeals for the full amount originally awarded by the jury in the trial court.

TEX. R. CIV. P. 328:

New trials may be granted when the damages are manifestly too small or too large, provided that whenever a court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal in said action, then the party remitting shall not be barred from contending in the appellate court that said remittitur should not have been required either in whole or in part, and if the appellate court sustains such contention it shall render such judgment as the trial court should have rendered without respect to said remittitur.

⁶ Because the decision in *Plesko v. City of Milwaukee*, 19 Wis. 2d 210, 120 N.W.2d 130 (1963), preceded the *Mulkerin* holding by seven years, the rule that a remitting party may cross-appeal for review of the reduced verdict will be referred to as the Wisconsin rule throughout this note.

⁹ In the interest of simplicity, the rule which denies a plaintiff who has accepted remittitur the right to challenge the trial court's determination on appeal will be referred to as the general rule.

⁷ 110 N.J. Super. at —, 264 A.2d at 749.

⁸ *Id.* at —, 264 A.2d at 749.

trated when the party for whose benefit the remittitur was ordered appeals.⁹ In such a case the plaintiff loses the advantages of his acceptance since he is forced to defend the trial court's decision on liability. The attempt at judicial economy is also frustrated by the increased calendar congestion caused by the defendant's appeal. Like the Wisconsin court in *Plasko v. City of Milwaukee*,¹⁰ the court in *Mulkerin* concluded that basic ideas of fairness argue against a defendant's receiving the benefits of both a reduced verdict and an opportunity to appeal on all issues without risking a reinstatement of the original verdict.¹¹

The pragmatic approach of the Wisconsin rule appears most equitable when compared to the harsh simplicity of the general rule. This is not to say, however, that the general rule is without logical basis. Whether phrasing the nonappealability in terms of waiver,¹² estoppel,¹³ or lack of standing,¹⁴ the common thread running through the decisions is the theory that one may not appeal from a judgment to which he has consented.¹⁵

In reaching this analogy with consent judgments in general, the courts follow a fairly uniform scheme of analysis. An examination of their decisions indicates that remittitur is considered to serve a dual function: First, it is the equivalent of a certificate, that, in the opinion of the court, the original verdict cannot be supported.¹⁶ Second, it represents an option offered out of fairness to the verdict winner to save him the difficulties incident to a second trial.¹⁷ In suggesting that he remit the excessive portion of his recovery, the court provides the plaintiff with an opportunity

⁹ *Id.* at —, 264 A.2d at 750.

¹⁰ 19 Wis. 2d at 221, 120 N.W.2d at 135.

¹¹ 110 N.J. Super. at —, 264 A.2d at 750.

¹² *E.g.*, *San Bernadino County v. Riverside County*, 135 Cal. 618, 67 P. 1047 (1902); *Plinsky v. Nolan*, 65 Ore. 402, 133 P. 71 (1913).

¹³ *E.g.*, *Florida E. Coast Ry. v. Buckles*, 83 Fla. 599, 92 So. 159 (1922); *McDaniel v. Hancock*, 328 Mich. 78, 43 N.W.2d 68 (1950); *Martin v. Jansen*, 113 Wash. 290, 193 P. 674 (1920).

¹⁴ *E.g.*, *Gough v. Halperin*, 306 Pa. 230, 159 A. 447 (1932); *accord*, *Clarkson v. Crawford*, 285 Pa. 299, 132 A. 350 (1926).

¹⁵ *E.g.*, *City of Bessemer v. Brantley*, 258 Ala. 675, 65 So. 2d 160 (1953); *Andres v. Green*, 7 Ill. App. 2d 375, 129 N.E.2d 430 (1955); *Los Angeles & S.L.R. Co. v. Umbaugh*, 61 Nev. 214, 123 P.2d 224 (1942); *Fleming v. Smouse*, 73 W. Va. 188, 80 S.E. 144 (1913).

¹⁶ *Ralston v. Philadelphia Rapid Transit Co.*, 267 Pa. 278, 284, 110 A. 336, 338 (1920). Although remittitur is not proper where the verdict is influenced by passion or prejudice so as to affect the issue of liability, it may be used in this first function to correct a verdict which is merely excessive. Comment, *Remittitur: Or the Law of Diminishing Returns*, 24 TENN. L. REV. 1155, 1159 (1957).

¹⁷ *Corabi v. Curtis Publishing Co.*, 437 Pa. 143, —, 262 A.2d 665, 669 (1970).

to prevent the expense and delay of further litigation. At the same time the court saves itself valuable time and the risk that the same result might again obtain when the case is retried. By construing the order which grants the new trial in conditional terms, the plaintiff is given the privilege of retaining that portion of the verdict not deemed excessive and defeating the defendant's demand for a new trial.¹⁸

It is in this second function of remittitur that the courts which follow the general rule find the basis for their argument. They observe that while a plaintiff has no claim to remittitur as a matter of right, neither can it be forced upon him without his assent.¹⁹ If he is dissatisfied he may reject the remittitur and either proceed to a second trial or, in many cases, take an appeal from the order which granted the new trial.²⁰ In either case he will be faced with the same situation as if there had been no suggestion for him to remit in the first place.²¹ The argument concludes that when the plaintiff files his acceptance, he has made an election to which he is bound.²² Any subsequent assertion that he is entitled to more would be wholly inconsistent with his prior election to accept the reduced amount in full satisfaction of his claim against the defendant.²³

It is arguable, though, that the limited options available under the general rule may not always provide the plaintiff with a viable means of protecting his self-interest. From his viewpoint, the dilemma may take on the following character: If he accepts the reduction in verdict, then he consents to receive an amount which he deems inadequate. If he rejects the reduction without appealing the order which granted the new trial, then he must undergo the time and expense of a second trial with the risk

¹⁸ *Carver v. Missouri-Kansas-Texas R.R.*, 362 Mo. 897, 916, 245 S.W.2d 96, 105 (1952).

¹⁹ Compare *Corabi v. Curtis Publishing Co.*, 437 Pa. 143, —, 262 A.2d 665, 669 (1970) with *Andres v. Green*, 7 Ill. App. 2d 375, 384, 129 N.E.2d 430, 434 (1955) and *Alabama & V. Ry. v. Davis*, 69 Miss. 444, 451, 13 So. 693, 695 (1891).

²⁰ Generally, the discretion of the trial court in ruling on a motion for a new trial based on excessiveness of damages is subject to review or reversal, but only for a clear abuse or arbitrary exercise of discretion. See, e.g., *Prosser v. Richman*, 133 Conn. 253, 50 A.2d 85 (1946); *Thomas v. Fleming*, 241 Miss. 26, 128 So. 2d 854 (1961); *Dodd v. Missouri-Kansas-Texas R.R.*, 354 Mo. 1205, 193 S.W.2d 905 (1946). Cf. *Busch, Remittiturs and Additurs in Personal Injury and Wrongful Death Cases*, 12 DEFENSE L.J. 521, 528 (1963) [hereinafter cited as *Busch*]. But see *Andres v. Green*, 7 Ill. App. 2d 375, 129 N.E.2d 430 (1955), in which it is suggested that there is no right of appeal in this situation.

²¹ *Corabi v. Curtis Publishing Co.*, 437 Pa. 143, —, 262 A.2d 665, 669 (1970).

²² E.g., *Dargis v. Maguire*, 156 So. 2d 897, 898 (Fla. App. 1963); *Iron R.R. v. Mowery*, 36 Ohio St. 418, 423 (1881). In both of these cases the plaintiffs' acceptance, through reluctantly or conditionally given, was deemed to have been absolute.

²³ *Corabi v. Curtis Publishing Co.*, 437 Pa. 143, —, 262 A.2d 665, 668 (1970).

that he may again be forced to accept what he believes to be an inadequate verdict. If he is able to appeal the order which granted the new trial, he must not only defend his position against all other grounds asserted in the defendant's motion, but he must also defend the reasonableness of the original verdict, even though he may consider it excessive in some amount. This latter problem becomes especially acute when the reduction amounts to a high percentage of the original verdict.²⁴

Only Tennessee meets this problem head-on by enabling the plaintiff to accept the remittitur under protest and then appeal directly from the action of the trial court.²⁵ Despite its obvious benefit to the plaintiff, this method provides no incentive to achieve finality at trial because the plaintiff's right to appeal is completely independent of the defendant's action following judgment in the lower court. In contrast, the Wisconsin rule encourages the defendant to make a considered appraisal of the merits of his appeal prior to seeking review.²⁶ Since the plaintiff's right to appellate review is limited to cross-appeal, the defendant tends to think twice before appealing and thereby opening the door to the higher court for the plaintiff. Like the Wisconsin rule, statutes in Nebraska²⁷ and New York²⁸ and a Texas rule of civil procedure²⁹ also encourage such judicial economy. At the same time they also provide some alleviation to the dilemma outlined in the previous paragraph in the event the defendant initiates the appeal process.

At first blush, the reasoning of the Wisconsin rule appears to be eminently fair. Implicit in its holding, however, is the basic notion of an appellate tribunal's competence in the area of damage determination—an assumption which is subject to some question.³⁰ Although higher courts have in the past found justification for imposing remittitur in the "economic

²⁴ *Id.* at —, 262 A.2d at 669. In *Corabi*, a suit for libel, slander, unfair competition and invasion of privacy, the plaintiffs' verdict had been reduced by sixty per cent in the trial court. Rather than face the problems of a second trial or be forced to defend the reasonableness of the original verdict on appeal, the plaintiffs accepted the remittitur. The acceptance, however, was conditioned by the statement that they retained whatever rights they might have had to seek appellate review. The court had little sympathy for their dilemma and held that the conditional acceptance amounted to an absolute rejection.

²⁵ TENN. CODE ANN. §§ 27-118, -119 (1955). See note 4 *supra*.

²⁶ See 110 N.J. Super. at —, 264 A.2d at 750.

²⁷ NEB. REV. STAT. § 25-1929 (1943). See note 4 *supra*.

²⁸ N.Y. CIV. PRAC. LAW § 5501 (McKinney 1963). See note 4 *supra*.

²⁹ TEX. R. CIV. P. 328. See note 4 *supra*.

³⁰ See Busch 521; Conklin, *Appellate Courts and the Quest for Just Compensation*, 42 N.D.L. REV. 397 (1966) [hereinafter cited as Conklin].

aspects of justice,"³¹ the practical expertise of the appellate judges³² and the need for uniform awards in comparable cases,³³ such reasoning cannot discount the fact that the only criterion for determination before the court is the cold statement of the trial record. Demeanor evidence and indications of a jury compromise, often invaluable to the trial judge in assessing the supportability of the original award, are totally absent at the appellate level. For this reason some degree of judicial restraint appears to be necessary, lest the higher courts find themselves embroiled in the sort of particularization best served at the trial level. As stated by Professor Conklin,

[L]ower courts sit to resolve all controversies which come within their jurisdiction because the alternative is chaos. Appellate tribunals sit to render principled judgment of more general applicability by reviewing what has already been authoritatively determined at an inferior level. When appellate courts become activists and particularists they risk the danger of fomenting the primordial chaos which the lower courts seek to order initially and, usually, quite adequately.³⁴

The degree of restraint actually exercised in this situation is necessarily dependent on the scope of review which the court adopts. The court in *Plesko* held that the trial judge's determination would not be disturbed unless it amounted to an abuse of discretion.³⁵ Although *Mulkerin* established no specific test by which to judge future cases, its language is strongly suggestive of the *Plesko* standard.³⁶ Since remittitur is a dis-

³¹ Conklin 399. He defines this term as "an attempt to do substantial justice in the shortest time possible."

³² The point of interference is not fixed on the caprice of judicial individualism; it is rather arrived at by a synthesis of all the experience that the judge has had: in the beginning as a law student, in the later controversies of law practice, in the hearing of cases and the writing of decisions, in the sum of all that he has observed in the courtroom and the library.

Mann v. Hunt, 283 App. Div. 140, —, 126 N.Y.S.2d 823, 824 (1953).

³³ See, e.g., *Carver v. Missouri-Kansas-Texas R.R.*, 362 Mo. 897, 918, 245 S.W.2d 96, 107 (1952). For views doubting the validity of such justification see *Busch* at 542 and *Hooker*, *The Adequate Award: Tennessee Trends*, 23 TENN. L. REV. 760 (1955).

³⁴ Conklin 403.

³⁵ 19 Wis. 2d at 221-22, 120 N.W.2d at 135.

³⁶ In light of defense counsel's argument before us, . . . we have the impression that he never seriously questioned the extent of Mrs. Mulkerin's injuries. If the remittitur was imposed by the court to mould the amount of Mrs. Mulkerin's verdict because of the foreman's statement that they gave her "wages for six years thirty thousand dollars; pain and anguish eighteen

cretionary tool,³⁷ such a standard appears to be the only reasonable form of verbalization. Nevertheless, the phrase "judicial discretion" has a tendency to produce some confusion in practice. "This phrase, though possessing some connotation of restriction, could well be likened unto a seemingly boundless judicial playground compassed about at some distant point by an irregular fence called propriety."³⁸ Although such imprecision is not uncommon in legal standards, it should be cautiously observed in this area. The broader the discretion which is invested in the lower courts, the more likely both they and their juries will be to exert greater care and competence at the trial level.³⁹ Only where the appellate court is convinced that the trial judge acted irrationally in suggesting remittitur should it interfere; if reasonable men could differ, the higher court should affirm.⁴⁰

Although *Plesko* forged the theoretical break with the general rule, it remained for *Mulkerin* to declare that an actual abuse of discretion had occurred.⁴¹ In so doing, the court restored the original verdict without considering other possible amounts. In view of the general recognition of the power of state appellate courts to impose remittitur and additur in the first instance,⁴² it can be assumed that, had the court in *Mulkerin* wished to restore less than the full amount, it could have done so without difficulty. Although the court may have had the ability to restore less than the full amount, this fact alone does not solve the problem of precisely what standard should be used in determining the recovery allowed. The court leaves unanswered whether they shall, in the future, look to the greatest amount a reasonable jury could have awarded, the smallest amount, or somewhere in between. It is arguable that New Jersey's adoption of the Wisconsin rule will carry with it adherence to the standard observed by the Wisconsin courts. In *Powers v. Allstate Insurance Co.*⁴³ the Wisconsin court rejected their previous yardstick of "the lowest amount for which

thousand dollars," the court's action cannot be sustained. He made a substantive determination that was solely the jury's province.

110 N.J. Super. at —, 264 A.2d at 750.

³⁷ See *Hollinger v. York Ry.*, 225 Pa. 419, 426, 74 A. 344, 345 (1909).

³⁸ Comment, *Remittitur: Or the Law of Diminishing Returns*, 24 TENN. L. REV. 1155, 1157 (1957).

³⁹ Conklin 406.

⁴⁰ *Id.*

⁴¹ See note 36 *supra*.

⁴² Conklin 398. See also *Southern Nat'l Ins. Co. v. Williams*, 224 Ark. 938, 277 S.W.2d 487 (1955); *Pitrowski v. New York, C. & St. L. R.R.*, 6 Ill. App. 2d 495, 128 N.E.2d 577 (1955).

⁴³ 10 Wis. 2d 78, 102 N.W.2d 393 (1960).

the court would permit a verdict to stand"⁴⁴ and adopted what it considered to be the majority rule. This latter rule allows the plaintiff to recover "an amount which the court considers reasonable."⁴⁵ Although the court's attention in that case was directed at achieving finality at trial, it would seem incongruous—and certainly more confusing—to adopt one standard for trial and another for appeal. In any event, the difficulty in fitting an exact dollar amount to the standard adopted will be magnified since the appellate court is one step further removed from the interplay of facts which give rise to certainty at the trial level.

Assuming that we are safe in attributing to the judiciary a degree of objectivity, insight and forbearance, then the Wisconsin rule may prove to be a valuable procedural tool. While not completely foreclosing appellate review to the remitting party, its limitation of applicability to cross-appeals tends to discourage frivolous appeals by defendants. In this respect, it could work to bring finality to more trial court decisions. Its inherent fairness leaves little room for criticism. Indeed its only defect—if it may properly be called such—is an underlying faith in the ability of appellate courts to pass upon damages. With a recognition of their own weaknesses in this area, however, appellate courts could easily avoid this problem through a degree of judicial restraint.

WILLIAM W. MAYWORTH

Constitutional Law—State Action—You Can't Take the City Out of the Park, But You Can Take the Park Out of the City

In 1966 the Supreme Court ruled that Baconsfield Park in Macon, Georgia, had acquired such "momentum" as a public facility that the mere changing from trustees who were public officials acting in their official capacity to private trustees would not dissipate the unconstitutional state action sufficiently to permit the park to be operated on a segregated basis.¹ By 1970 that momentum seemed to have run out. In *Evans v. Abney*² the Court ruled that the decision of the Georgia courts that the park must revert to the heirs of the testator did not involve sufficient state action to violate the fourteenth amendment.

⁴⁴ *Id.* at 90, 102 N.W.2d at 400.

⁴⁵ *Id.*

¹ *Evans v. Newton*, 382 U.S. 296 (1966).

² 396 U.S. 435 (1970).